

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On May 30, 2008 appellant, then a 54-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained neck, low back, bilateral lower extremity, and bilateral arm conditions causally related to factors of his federal employment.³ By decision dated September 15, 2008, OWCP denied his occupational disease claim, finding that the medical evidence of record was insufficient to establish that he sustained a medical condition as a result of the identified work duties. Appellant requested a hearing and, by decision dated April 7, 2009, an OWCP hearing representative affirmed the September 15, 2008 decision.

Appellant subsequently appealed to the Board. By decision dated May 21, 2010, the Board set aside the April 7, 2009 OWCP decision denying his occupational disease claim.⁴ The Board found that OWCP's hearing representative, in the April 7, 2009 decision, failed to support her conclusions with adequate factual findings. The Board remanded the case for OWCP to determine whether appellant had established neck, low back, bilateral lower extremity, and bilateral arm conditions causally related to factors of his federal employment.

By a June 21, 2010 decision, an OWCP hearing representative denied appellant's claim, finding that the medical evidence of record was insufficient to establish employment-related neck, low back, bilateral lower extremity, or bilateral arm conditions.

Appellant again appealed to the Board. By decision dated October 27, 2011, the Board affirmed the June 21, 2010 decision.⁵ The Board found that appellant had not submitted rationalized medical evidence establishing a diagnosed medical condition due to the implicated work factors. The Board reviewed the reports from Dr. Steven A. Norris, an attending internist, and found that he failed to provide a reasoned opinion regarding how he sustained a diagnosed condition causally related to the duties of his federal employment.

On May 4, 2012 appellant, through counsel, requested reconsideration. By decision dated July 18, 2012, OWCP denied modification of its prior merit decision. It found that the additional medical evidence from Dr. Norris did not contain a history of the employment factors appellant alleged caused his work injury or medical rationale sufficient to show that he sustained a diagnosed condition due to the identified work factors.

² Docket No. 09-2177 (issued May 21, 2010); Docket No. 11-0488 (issued October 27, 2011).

³ Appellant initially claimed that he sustained a recurrence of disability causally related to a January 5, 1984 employment injury, accepted by OWCP for neck strain and right shoulder myositis under File No. xxxxxx090.

⁴ Docket No. 09-2177 (issued May 21, 2010).

⁵ Docket No. 11-0488 (issued October 27, 2011).

Appellant, through counsel, requested reconsideration of OWCP's July 18, 2012 decision on August 18, 2015. By decision dated July 7, 2016, OWCP denied his request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On January 9, 2017 appellant again requested reconsideration of the July 18, 2012 decision, asserting that he was enclosing evidence not previously reviewed by OWCP. He submitted a September 9, 2014 magnetic resonance imaging (MRI) scan of the cervical spine, electromyograms dated June 18, 2003 and September 16 and 22, 2005, and a September 25, 1995 therapy report. Appellant further provided evidence regarding a complaint and demand for jury trial he filed in U.S. District Court on April 12, 2000 against the employing establishment for breach of the collective bargaining agreement, discrimination, and retaliation. In an August 2, 2001 order, a U.S. District Court judge granted one count of the employing establishment's motion for summary judgment and denied summary judgment on the remaining counts. Appellant also submitted a September 18, 2001 stipulation for compromise settlement between himself and the employing establishment regarding his claim for discrimination and reprisal. In an October 5, 2008 statement, a coworker described appellant's treatment by the employing establishment.

By decision dated January 26, 2017, OWCP denied appellant's request for reconsideration of its July 18, 2012 decision as it was untimely filed and failed to demonstrate clear evidence of error. It found that he had not submitted evidence showing an error in its prior decision. OWCP noted that appellant submitted evidence regarding a civil suit he brought against the employing establishment which was dismissed.

On February 6, 2017 appellant again requested reconsideration. He related that OWCP erred in finding that his Equal Employment Opportunity (EEO) complaint was dismissed in August 2001 as the order found only one count dismissed and denied the request for summary judgment on the remaining issues. Appellant asserted that discrimination based on race, retaliation, and disability constituted compensable work factors. He maintained that his civil suit established that the employing establishment criminally erred in failing to process his claim.

Appellant again submitted the September 18, 2001 stipulation for compromise settlement between himself and the employing establishment. He also submitted additional evidence relevant to his EEO claim against the employing establishment, including a list of witnesses, a letter from his attorney, the employing establishment's January 7, 1999 acknowledgement of his discrimination complaint, and a June 7, 1999 intake assessment from a counseling service with the employing establishment.

In a February 6, 2017 addendum to his request for reconsideration, appellant related that he had advanced a new legal argument by submitting evidence from his civil suit showing that the employing establishment erred in processing his claims for compensation. He submitted correspondence dated 1998 and 1999 from an injury compensation specialist with the employing establishment.

By decision dated March 2, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that the evidence related to his civil action against the employing establishment for discrimination and

retaliation was not relevant to the issue of whether he had established a neck, back, upper extremity, or lower extremity condition due to factors of his federal employment.

On appeal appellant contends that he received a favorable decision regarding his EEO complaint and thus established retaliation and discrimination based on race and disability, citing OWCP File No. xxxxxx090. He maintains that OWCP failed to consider medical evidence, including reports from 2004 and 2006, and asserts that the medical evidence is sufficiently reasoned and based on an accurate history of injury to support his claim. Appellant further argues that he should not have originally filed his claim as a recurrence of disability and that his EEO claim established that the employing establishment erred in failing to submit his traumatic injury and occupational disease claims. He discusses his history of injury and the medical evidence of record. Appellant requests that his case be reopened to include additional diagnosed conditions.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Workers' Compensation System.⁷ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁸

OWCP may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁹ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (February 2016).

⁸ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which, on its face, shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

ANALYSIS

OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ The last merit decision was issued by OWCP on July 18, 2012. Appellant's January 9 and February 6, 2017 requests for reconsideration were received more than one year after the July 18, 2012 decision and thus the Board finds that they were untimely filed. Therefore, he must demonstrate clear evidence of error by OWCP in its July 18, 2012 decision.¹⁶

The Board further finds that appellant failed to demonstrate clear evidence of error. In support of his January 9, 2017 reconsideration request, appellant submitted the results of diagnostic studies dated 2003 to 2014 and a September 25, 1995 report from a therapist. OWCP, in its last merit decision, denied appellant's claim as he had not submitted reasoned medical evidence sufficient to establish an employment-related neck, low back, bilateral lower extremity, or bilateral upper extremity condition. The diagnostic studies and therapist report fail to address causation and are thus insufficient to raise a substantial question as to the correctness of OWCP's decision.¹⁷ Additionally, as noted, clear evidence of error is intended to represent a difficult standard, and evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁸

¹¹ *Robert G. Burns*, 57 ECAB 657 (2006).

¹² Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.5(a) (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹³ *See D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ *See Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ 20 C.F.R. § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

¹⁷ *See T.W.*, Docket No. 13-0594 (issued August 5, 2013).

¹⁸ *See A.M.*, Docket No. 17-1900 (issued February 22, 2018).

Appellant further submitted evidence relevant to an EEO complaint he brought against the employing establishment and suit that he filed in U.S. District Court alleging discrimination and reprisal by the employing establishment. This evidence, however, is not relevant to the pertinent issue of whether he has submitted medical evidence showing that he sustained a neck, low back, bilateral leg, or bilateral arm condition causally related to the implicated employment factors. The underlying issue is medical in nature and must be addressed by medical evidence.¹⁹ In order to demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.²⁰

In his February 6, 2017 request for reconsideration, appellant argued that OWCP erred in finding in its January 26, 2017 decision that a court had dismissed his EEO complaint, noting that only one count was dismissed. He asserted that his civil suit established that the employing establishment erred in failing to properly process his workers' compensation claims. Appellant submitted additional evidence regarding his complaint of discrimination and retaliation by the employing establishment. As noted, however, this evidence is not relevant to the issue in this case, which is medical in nature.²¹

On appeal appellant contends that he received a favorable decision on his EEO complaint and established discrimination and harassment by the employing establishment. Again, as noted, the pertinent issue is whether he has established an employment-related back, neck, upper extremity, or lower extremity condition.²² The submission of nonmedical evidence does not demonstrate clear evidence of error by OWCP in its last merit decision.²³

Appellant also asserts that OWCP did not consider all of the medical evidence. He did not, however, support his contention by identifying any clear error by OWCP in its consideration of the medical evidence of record. Appellant further reviews the medical evidence and notes that his claim was properly considered as an occupational disease rather than a recurrence of disability. He asserts that the employing establishment did not properly submit his traumatic injury and occupational disease claims. These contentions, however, are not relevant to the pertinent issue of whether OWCP clearly erred in finding the medical evidence insufficient to show that he sustained a neck, low back, bilateral lower extremity, or bilateral arm condition causally related to factors of his federal employment.²⁴

Appellant, in his requests for reconsideration, did not raise an argument or submit any evidence that manifests on its face that OWCP committed an error in denying his occupational disease claim. He has not provided evidence of sufficient probative value or raise a substantial

¹⁹ See *E.C.*, Docket No. 17-1229 (issued December 13, 2017).

²⁰ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²¹ See *F.R.*, Docket No. 09-0575 (issued January 4, 2010) (evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error).

²² See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²³ See *E.C.*, *supra* note 19.

²⁴ See *supra* note 20.

question as to the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.²⁵

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 2 and January 26, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 21, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁵ See *M.B.*, Docket No. 17-1505 (issued January 9, 2018).